Filed 5/12/10 P. v. Willis CA5

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. TONY LEROY WILLIS, Defendant and Appellant.	F057178 (Super. Ct. No. F04908958-2) **O P I N I O N**

THE COURT*

APPEAL from a judgment of the Superior Court of Fresno County. James L. Quaschnick, Judge.

Rita Barker, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Senior Assistant Attorney General, Charles A. French and Craig S. Meyers, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Wiseman, Acting P.J., Levy, J., and Gomes, J.

On June 16, 2006, appellant, Tony Leroy Willis, was represented by attorney George Herman when he pled no contest to 12 felonies and 5 misdemeanors and admitted 10 enhancements and allegations that he had two convictions within the meaning of the three strikes law (Pen Code, § 667, subd. (a)(b)).[1] Willis entered his plea in exchange for an indicated sentence of 25 years to life.

On September 1, 2006, Willis, without the assistance of counsel, made an oral motion to withdraw his plea. After denying the motion, the court struck several counts and enhancements and sentenced Willis to concurrent terms of 25 years to life on count 1, concurrent 25 years-to-life terms on counts 8, 9, 11, 12, and 13, and a stayed term of 25 years to life on count 10.[2]

Following Willis's timely appeal, on May 20, 2008, this court reversed and remanded the matter to the trial court for further proceedings after finding Willis had stated a nonfrivolous ground for withdrawing his plea and was entitled to have the benefit of counsel in presenting his motion.

On February 20, 2009, the court heard and denied Willis's motion to withdraw his plea and reinstated the judgment.

On this appeal, Willis contends: 1) the court abused its discretion when it denied his motion to withdraw his plea; 2) the court erred in imposing a $35 fine pursuant to Government Code section 70373; 3) the court erred by its failure to recalculate his entitlement to actual custody credit and to award him certain conduct credit; and 4) the

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[1] All further statutory references are to the Penal Code, unless otherwise indicated.

[2] Willis was sentenced on his convictions for the following felony offenses: resisting a peace officer resulting in serious bodily injury in count 1; vehicle theft in count 8; evading a peace officer in count 9; possession of a firearm by a felon in count 10; possession of ammunition by a felon in count 11; possession of methamphetamine while armed with a firearm in count 12; and receiving stolen property in count 13.

court erred by its failure to dismiss count 16. We will find merit to Willis's fourth contention and partial merit to his second and third contentions. In all other respects, we will affirm.

FACTS

On August 22, 2008, the court appointed substitute counsel to represent Willis on his motion to withdraw his plea.

On November 14, 2008, substitute counsel filed a motion to withdraw plea on Willis's behalf. The motion alleged as a basis for withdrawing Willis's plea that Willis received ineffective assistance of counsel in entering his plea because defense counsel Herman "failed to clearly discuss with [Willis] all the options available to him before advising him to accept the plea bargain as offered" and that Herman "failed to fully discuss and investigate all factual and legal defenses and consequences of [Willis's] plea before having [Willis] execute and enter his plea." Thus, according to the moving papers, Willis was entitled to withdraw his plea because he was denied the effective assistance of counsel in entering the plea. Under a separate heading, the motion alleged that Willis mistakenly believed he would receive a sentence of 19 years 4 months.

In a short supporting declaration, Willis stated, "At the time I pled, I believed that one of my strike priors would be stricken by the Court for purposes of sentencing[.] *I believed this because it was told to me by my attorney, George Herman*. But for this belief I never would have pled to an indeterminate life case." (Italics added.)

On November 19, 2008, the prosecutor filed a response. In a declaration in support of the response, Herman stated that prior to Willis entering his plea, Herman explained to him that the evidence against him was strong and there was a strong likelihood of conviction. On the second day of voir dire, Willis told Herman he wanted to take an indicated sentence of 25 years to life that the court offered. Afterwards, Herman filled out the change of plea form showing that Willis would plead "straight up"

and receive a sentence of 25 years to life. While going over the form, Herman explained to Willis that a sentence of 25 years to life meant he would receive a parole hearing in 25 years. Herman denied telling Willis he would serve less than 25 years. Herman also stated that during the change of plea proceedings, Willis acknowledged he would receive a term of 25 years to life and he never expressed any concerns to Herman or asked any questions regarding the length of the sentence he would receive. Nor did Willis ever discuss with Herman that he thought he would receive a sentence of only 19 years 4 months.

Herman first learned that Willis claimed Herman told him he would receive a sentence of 19 years 4 months when Willis made this assertion at his original sentencing hearing on September 1, 2006. In response to this assertion, Herman told the court he never told Willis he would have one or both of his strike convictions stricken under the plea agreement. After Willis's original sentencing hearing, Willis turned to Herman and stated, "'… nothing personal Mr. Herman, but the only reason I told the court about the 19 years was to set up my rights on appeal ….' (paraphrased.)"

On February 20, 2009, after hearing counsels' arguments, the court found Willis had not been denied the effective assistance of counsel and denied Willis's motion. The trial court then resentenced Willis to an indeterminate term of 25 years to life. In pertinent part, the court also imposed a $35 fine pursuant to Government Code section 70373. The court, however, did not recalculate appellant's entitlement to actual custody credits from the date of his original sentencing through the date of his resentencing or award him any additional presentence conduct credit.

DISCUSSION

The Motion to Withdraw Plea

Willis contends that, prior to entering his plea, he mistakenly understood the court would strike one of his prior strike convictions and sentence him to 19 years 4 months

instead of 25 years to life. Willis does not directly challenge the court's finding that he was not denied the effective assistance of counsel in entering his plea. Instead, Willis does so by indirectly characterizing the court's reliance on certain facts as "illogical, unreasonable, and therefore an abuse of discretion." Willis also contends the court abused its discretion in denying his motion because it did not rule on the alternate basis for the motion, i.e., that irrespective of any misadvise from Herman, he simply mistakenly believed he would receive a sentence of 19 years 4 months. We will reject these contentions.

> "Plea bargaining and pleading are critical stages in the criminal process at which a defendant is entitled, under both the Sixth Amendment to the federal Constitution and article I, section 15 of the California Constitution, to the effective assistance of legal counsel. [Citations.] 'It is well settled that where ineffective assistance of counsel results in the defendant's decision to plead guilty, the defendant has suffered a constitutional violation giving rise to a claim for relief from the guilty plea.' [Citations.]
>
> "To establish ineffective assistance of counsel under either the federal or state guarantee, a defendant must show that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and that counsel's deficient performance was prejudicial, i.e., that a reasonable probability exists that, but for counsel's failings, the result would have been more favorable to the defendant. [Citations.]" (*In re Resendiz* (2001) 25 Cal.4th 230, 239.)
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> "A petitioner's assertion he would not have pled guilty if given competent advice 'must be corroborated independently by objective evidence.'" (*Id*. at p. 253.)

Willis's trial court claim that he was denied the effective assistance of counsel in entering his plea was based on his assertion in his supporting declaration that Herman specifically told him he would receive a sentence of 19 years 4 months. It is clear from the court's ruling that in denying Willis's motion, it believed Herman and implicitly found that he did not make this statement to Willis.

A reviewing court is required to accept all the factual findings of the trial court that are supported by substantial evidence. (*People v. Ravaux* (2006) 142 Cal.App.4th 914, 917.) The court's finding that Herman did not make the statement attributed to him by Willis is amply supported by the record including the statements in Herman's declaration and Willis's statement during the change of plea proceedings that he understood under the plea agreement he would receive a stipulated sentence of 25 years to life.[3] Thus, Willis has not met his burden of showing he received deficient representation in entering his plea.

Further, Willis did not provide any evidence that independently corroborated his claim that he would never "have pled to an indeterminate life case." Thus, we reject Willis's ineffective assistance of counsel claim for the additional reason that he did meet his burden of showing he was prejudiced by Herman's alleged deficient representation.

Willis contends that during the change of plea proceedings, the court never asked him whether anyone else had made any other promises to him other than those memorialized in the plea agreement. According to Willis, this would have given him the opportunity to inform the court of his understanding that he would receive a sentence of 19 years 4 months. Willis thus posits that the court abused its discretion in denying his motion because in doing so, the court drew "an inference" from his failure "to respond to a question that was never asked."![4] However, Willis had ample opportunity during the change of plea hearing to inform the court of his understanding of the sentence he would receive and at one point acknowledged understanding that under his plea agreement he

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[3] During the June 16, 2006, change of plea proceedings, Willis acknowledged in response to questioning by the court, that he understood that pursuant to his plea he would receive a sentence of 25 years to life.

[4] Presumably, Willis means that the court improperly inferred that Willis understood he would be sentenced to a term of 25 years from his failure to answer the above noted question that the court did not ask him.

would receive a sentence of 25 years to life. And, as noted earlier, the record amply supports the court's implicit finding that Willis understood his plea agreement provided that he would receive a term of 25 years to life. Thus, there is no merit to Willis's contention that in denying his motion, the court improperly relied on his failure to answer a question it did not ask him.

In announcing its ruling, the court noted that Willis did not mention his alleged sentencing misunderstanding until he was about to be sentenced. Willis contends it was "illogical, unreasonable and therefore an abuse of discretion" for the court to use this fact to deny his motion. According to Willis, his failure to mention this alleged misunderstanding prior to his sentencing hearing is understandable because that was the first point where "things did not proceed according to his understanding." Willis is wrong. The first time things did not proceed according to Willis's alleged understanding was when he was presented with a plea agreement to sign that provided that he would receive a stipulated sentence of 25 years to life and again when the court informed him during the change of plea proceedings that under his plea agreement he would receive this term. Thus, there was nothing illogical or unreasonable in the court relying on Willis's belated assertion that he believed he would receive a lesser term to infer that Willis fabricated this claim.

In denying Willis's motion, the court also cited Willis's post sentencing statement to Herman that Willis told the court about the "19 years" in order to set up his appeal rights. Willis claims the most reasonable interpretation of his apology to Herman for "bringing up the 19 years" to the court was that it was a reference to previous discussions between Willis and Herman regarding Willis being sentenced to a term of 19 years 4 months. Thus, according to Willis, the court erred in relying on his apology to deny his motion. We disagree.

Had there been previous discussions between Willis and Herman regarding a 19-year term there would have been no need for Willis to apologize to Herman for mentioning a 19-year term to the court and, in all likelihood, Willis would have mentioned these discussions to Herman when he apologized. In any case, whatever the significance of Willis's apologetic statements when viewed in isolation, the evidence amply supports the court's implicit finding that Herman did not tell Willis he would be sentenced to a term of 19 years 4 months. Thus, in the context of the record evidence as a whole, the only reasonable interpretation of Willis's apologetic statements to Herman was that Willis fabricated his claim that Herman told him he would receive a sentence of 19 years 4 months.

Nor is there any merit to Willis's claim that the court abused its discretion in denying his motion to withdraw his plea because it did not rule on his alternate basis for the motion, i.e., that he simply, mistakenly understood he would receive a sentence of 19 years 4 months.

"In order to preserve an issue for review, a defendant must not only request the court to act, but must press for a ruling. The failure to do so forfeits the claim. [Citations.]" (*People v. Ramirez* (2006) 39 Cal.4th 398, 472-473.)

Willis did not present any evidence or argument in support of his claim that he was simply mistaken in his belief that he would receive a sentence of 19 years 4 months. Nor did he ever press the court for a ruling on this claim. By failing to do so, he waived this claim on appeal. Thus, we conclude the court did not abuse its discretion when it denied Willis's motion to withdraw his plea.

The Government Code Section 70373 Fine

Willis contends that the court's imposition of a $35 fine pursuant to Government Code section 70373 violated state and federal constitutional prohibitions against ex post

facto laws and violated the due process prohibition against imposition of a greater sentence upon resentencing following remand. We will reject these contentions.

> "Under the United States Constitution, '"'any statute [1] which punishes as a crime an act previously committed, which was innocent when done; [2] which makes more burdensome the punishment for a crime, after its commission, or [3] which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as *ex post facto*.'"' [Citations.]" (*People v. Saelee* (1995) 35 Cal.App.4th 27, 30.)

Government Code section 70373, subdivision (a)(1), became effective on January 1, 2009, with the enactment of Senate Bill No. 1407 (2007-2008 Reg. Sess.). It provides:

> "(a)(1) To ensure and maintain adequate funding for court facilities, an assessment shall be imposed on every conviction for a criminal offense, including a traffic offense, except parking offenses as defined in subdivision (i) of Section 1463 of the Penal Code, involving a violation of a section of the Vehicle Code or any local ordinance adopted pursuant to the Vehicle Code. The assessment shall be imposed in the amount of thirty dollars ($30) for each misdemeanor or felony and in the amount of thirty-five dollars ($35) for each infraction." (Gov. Code, § 70373(a)(1).)

Retroactive application of a fee pursuant to the above section does not violate the ex post facto clause of the state and federal constitutions because imposition of the fine is nonpunitive and therefore not prohibited by the ex post facto clause. (*People v. Brooks* (2009) 175 Cal.App.4th Supp. 1, 7.) Further, since imposition of the fee is not punitive, imposition of this fee did not violate the due process prohibition against imposition of a greater sentence upon resentencing following remand. However, since Government Code section 70373 limits the confinement fee to $30 for felony convictions, we will reduce Willis's confinement fee from $35 to $30.

The Conduct Credit

Willis contends the court erred by its failure to recalculate his total actual custody credits from the time of his arrest in this matter until the time he was resentenced on February 20, 2009, and to credit that time against the subsequent sentence imposed.

Willis also contends the court erred by its failure to award him presentence conduct credit for the time he spent in custody from the date remittitur issued in this matter until he was resentenced. We will find merit to Willis's first contention and reject his claim that he is entitled to additional presentence conduct credit.

In *People v. Buckhalter* (2001) 26 Cal.4th 20 (*Buckhalter*), the Supreme Court stated: "When, as here, an appellate remand results in modification of a felony sentence during the term of imprisonment, the trial court must calculate the *actual time* the defendant has already served and credit that time against the 'subsequent sentence.' [Citation.]" (*Id*. at p. 23.) Thus, we agree that the court erred by its failure to calculate the actual time Willis served in custody from the time of his original arrest in this matter until February 20, 2009, when it resentenced him, and to credit that time against the subsequent sentence it imposed.

Moreover, "[a] detainee or inmate may earn credits for good behavior and participation in qualifying work programs to shorten the term of sentence (collectively referred to as conduct credits). Different rules and rates apply to presentence and postsentence detainees. The rate at which these conduct credits may be earned depends in part on whether the custody time during which the credits were earned is characterized as presentence or postsentence custody." (*People v. Johnson* (2004) 32 Cal.4th 260, 263 (*Johnson*).)

For purposes of calculating a defendant's entitlement to presentence custody credit when a defendant's case is remanded to the trial court for further proceedings, "[o]ur Supreme Court designated four distinct phases for the sake of convenience … [Citation.] 'Phase I is the period from the initial arrest to the initial sentencing .... Phase II is the period from the initial sentencing to the reversal .... Phase III is the period from the reversal to the second sentencing ..., and phase IV is the period after the second and final

sentencing.' [Citation.]" (*People v. Donan* (2004) 117 Cal.App.4th 784, 789, fn. 5 (*Donan*).)

In *Donan*, after the defendant's convictions for first degree murder and attempted robbery were overturned on appeal, the defendant was convicted of the same crimes by a jury. (*Donan, supra,* 117 Cal.App.4th at p. 786.) On resentencing, the trial court awarded the defendant presentence actual custody and presentence conduct credits for phase I and phase III. In determining whether the defendant in that case was entitled to presentence conduct credits for phase III, the *Donan* court compared the Supreme Court decisions in *Buckhalter*, *In re Martinez* (2003) 30 Cal.App.4th 29 (*Martinez*), and *Johnson* as follows:

> "In *Buckhalter*, the defendant was convicted of multiple felonies committed on a single occasion. He appealed his convictions, and the Court of Appeal remanded the case 'on sentencing issues only.' [Citation.] Buckhalter was transmitted from prison to county jail for the resentencing. Upon resentencing, the trial court granted section 4019 credits from the time of the arrest to the first sentencing and refused to grant credits for any time spent by defendant in county jail after remand. Defendant appealed contending he should have received additional section 4019 credits from the time of his remand to his second sentencing. The Court of Appeal disagreed and the Supreme Court granted review 'limited to the issue whether "a trial court must recalculate custody and conduct credits following remand upon resentencing."' [Citation.] The Supreme Court concluded: '[A]n appellate remand solely for correction of a sentence already in progress does not remove a prisoner from the Director's custody or restore the prisoner to presentence status as contemplated by section 4019. Clearly defendant is not entitled to section 4019 credits for his time in a state penitentiary. Nor could he earn them during the time he was physically housed in *county jail* to permit his participation in the remand proceedings. Section 4019 does allow such credits for presentence custody in specified city or county facilities. [Citation.] But defendant's temporary removal from state prison to county jail as a consequence of the remand did not transform him from a state prisoner to a local presentence detainee. When a state prisoner is temporarily away from prison to permit court appearances, he remains in the constructive custody of prison authorities and continues to earn sentence credits, if any, in that status. [Citations.]' (*Buckhalter, supra,* 26 Cal.4th at pp. 33-34, …, italics in original.)

"In *Martinez*, the defendant was convicted of petty theft with priors. Because the conviction was a third strike, she was sentenced to state prison for 25 years to life. Her conviction was reversed on habeas corpus due to ineffective assistance of counsel, and the matter was remanded to the trial court. Upon remand, the defendant pled guilty, the trial court struck one of her prior convictions, and then resentenced her as a 'second striker.' [Citation.] It granted section 4019 credits for phases I and III, but not for phase II, the time defendant spent in prison between her initial sentencing and remand after her successful habeas corpus petition. Relying on the reasoning of *Buckhalter*, the Supreme Court concluded she was not eligible for section 4019 credits for phase II because she was a state prison inmate during that time, notwithstanding the fact her conviction had been reversed. (*Martinez, supra,* 30 Cal.4th at pp. 35-36, ….)

In *Johnson*, the defendant was found guilty of two counts of vehicle theft. On May 27, 1999, the trial court sentenced the defendant to state prison. On June 18, 1999, the trial court recalled defendant's sentence and commitment pursuant to … section 1170, subdivision (d). On June 28, 1999, the defendant was resentenced to state prison. The trial court refused to grant defendant section 4019 conduct credits for the period between May 27, 1999, and June 28, 1999. That was the issue before the Supreme Court. It concluded that the trial court's recall of defendant's sentence was similar to the limited remand in *Buckhalter* and therefore he was not entitled to section 4019 credits. (*Johnson, supra,* 32 Cal.4th at pp. 267-268, ….)" (*Donan, supra,* 117 Cal.App.4th at pp. 790-792, fn. omitted.)

Thus, the court reasoned:

"Here, there was no limited recall ordered by the Court of Appeal, as in *Buckhalter*, and no recall of a sentence by the trial court, as in *Johnson*. Appellant's original conviction was reversed, as in *Martinez*. Respondent contends that *Martinez* is not applicable to the issue before this court because it addressed section 4019 credits for only phase II. It is true that the issue decided by the Supreme Court was whether such credits are available in a phase II commitment, but the sentence given in *Martinez* included *section 4019* credits for phases I and III. The Supreme Court noted: 'The parties do not dispute that petitioner should accrue credits as a presentence inmate for phases I and III (see § 4019), and they likewise agree that petitioner should accrue credits as a postsentence second striker for phase IV.' [Citation.]

"From these authorities, we conclude that appellant is entitled to receive section 4019 conduct credits for phases I and III, but, pursuant to *Martinez*, he is not entitled to receive section 4019 credits for phase II. It is

> up to the Department of Corrections to decide what conduct credits are received for phase II. [Citations.] …." (*Id.* at p. 792.)

Willis's conviction was, in effect, only conditionally reversed pending the court's resolution of Willis's request to withdraw his plea. Unlike the defendant in *Martinez,* who was returned to her preconviction status by the outright reversal of her conviction, remand in the instant case only allowed for the possibility that Willis would return to that status if the court granted his request to allow him to withdraw his plea. However, this did not occur because ultimately the court denied Willis's motion to withdraw plea and the original judgment was then reinstated with the addition of a confinement fee. This makes Willis's case more akin to the limited remand of *Buckhalter*. Thus, we conclude that the remand of Willis's case did not return him to presentence status and he is not entitled to presentence conduct credit pursuant to section 4019 for the time he spent in custody during phase III, the date remittitur issued through the date he was resentenced on February 20, 2009. Of course, had the court granted Willis's motion to withdraw his plea, he would have been in the same position as the defendants in *Martinez* and *Donan* and, thus, entitled to presentence conduct credit for this period of time.

Moreover, since we can readily determine from the record how many days Willis served in postsentence custody through the date he was resentenced after remand, in the interest of judicial economy, we will calculate this figure rather than remanding the matter to the trial court for this purpose. With this in mind, our calculations disclose that Willis was in actual custody 903 days from September 2, 2006, the day after he was originally sentenced, until February 20, 2009, the day he was resentenced. Thus, we will direct the trial court to include this figure in an amended abstract of judgment.

The Failure to Dismiss Count 16

Willis's plea bargain provided that he would be sentenced to an indeterminate term of 25 years to life. On remand, at a hearing on December 18, 2008, the court was concerned whether it could impose concurrent, indeterminate terms on Willis's multiple

felony convictions in the instant case. In response to this concern, the prosecutor stated that she would dismiss all the counts charged against Willis except count 1, so the court could sentence Willis to a term of 25 years to life as per his plea agreement. However, after the court denied Willis's motion to withdraw his plea, the prosecutor mistakenly neglected to ask the court to dismiss count 16.[5] Willis contends that as a matter of procedural due process, he is entitled to have count 16 dismissed. Respondent does not object to count 16 being dismissed. In view of the foregoing circumstances, we will dismiss count 16.

DISPOSITION

The judgment is modified as follows: 1) Willis's confinement fee pursuant to Government Code section 70373 is reduced from $35 to $30; 2) count 16 is dismissed; and, 3) Willis is awarded 903 days of postsentence actual custody credit. The trial court is directed to prepare an abstract of judgment consistent with this opinion and to forward a certified copy to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.

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[5] Willis was convicted of misdemeanor resisting arrest (§ 148) in count 16.